NATIONAL LABOR RELATIONS BOARD

REGION 28

IN RE:

NATIONAL LABOR RELATIONS BOARD; FRY'S FOOD STORES; UNITED FOOD AND COMMERCIAL WORKERS UNION (UFCW) LOCAL 99

(Karen Medley, Kimberley Stewart, Elaine Brown, Shirley Jones, Saloomeh Hardy, Janette Fuentes, Tommy Fuentes) 28-CA-022836; 28-CA-022837; 28-CA-022838; 28-CA-022840; 28-CA-022858; 28-CA-022871; 28-CA-022872; 28-CB-7045; 28-CB-7047; 28-CB-7048; 28-CB-7062; 28-CB-7063

BRIEF IN SUPPORT OF APPLICATION FOR ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

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STATEMENT OF THE CASE

The Equal Access to Justice Act ("EAJA", (5 U.S.C. § 504(a)(1))) and the Board's implementing regulations (Section 102.144(a) of the Board's Rules and Regulations) authorize payment by the government of attorney's fees and costs for successful litigation against the government. A litigant who establishes eligibility under EAJA is entitled to a fee award for both litigating the case and litigating the fee request. The Equal Access to Justice Act provides that fees "shall" be awarded to a "prevailing party" in actions "brought by ... the United States" unless the position of the United States was "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1); *Precision Concrete v NLRB*, 362 F.3d 847, 851 (DC Cir. 2004). The burden lies with the government agency to show that its position was substantially justified. *E W Grobbel Sons*, Inc. *v. NLRB*, 175 F.3d 875 (6th Cir. 1999); *Hanover Potato Prods.*, *Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993).

This case presents a textbook example of the government lacking substantial justification. General Counsel's overall position was unjustified. Moreover, its position at each discrete stage of the proceedings was also unjustified. The Union tried to litigate efficiently. But General Counsel insisted on litigating legal theories that were either incomprehensible, or had been repeatedly rejected. General Counsel unnecessarily multiplied the proceedings against the advice of Administrative Law Judge Kocol, and against clear Board precedent. General Counsel's conduct forced the Union to waste considerable dues dollars on legal fees, for which the Union is now entitled to recover.

The Union recognizes that because Charging Parties have filed a petition for judicial review in this matter, further agency proceedings on this fee application are stayed pursuant to Board Rules 102.148(c) (which does not stay the deadline for filing this application).

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ARGUMENT

I. UFCW Local 99 is a Prevailing Party.

The Board denied all of the relief requested by the Acting General Counsel ("GC") against UFCW Local 99. The Supreme Court has held that a party "prevails" under the EAJA when the outcome of the litigation "materially alters the legal relationship between the parties by modifying the [adversary's] behavior in a way that directly benefits the [other party]." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). The legal relationship between the parties is altered here because Judge Kocol dismissed the complaint in its entirety, and the Board Order affirmed Judge Kocol's rulings findings and conclusions. The Union falls well under EAJA's assets test. There can be no dispute that the Union is a "prevailing party" entitled to fees under the EAJA unless General Counsel proves substantial justification or extraordinary circumstances.

II. The Position of the Government Was Not Substantially Justified

Attorney fees may be denied if the position of the government was substantially justified, but it is the obligation of the GC to show that its position was substantially justified. *Grobbell, supra*. If the GC fails to convince this Judge that its position was substantially justified, the statute calls for an award of Local 99's attorney fees.

A. Seen as an integrated whole, the position of the government was not substantially justified.

The government's position is not substantially justified when their legal theories or their litigation conduct has no reasonable basis. *Pierce v. Underwood*, 487 U.S. 552, 563-66 (1988)(an agency's position is "substantially justified" where the evidence is 'what a reasonable mind might accept as adequate to support a conclusion"). In applying this test the Board looks both at the overall case and each phase:

For the purpose of deciding whether litigation was substantially justified, "EAJA ... favors treating a case as an inclusive whole rather than as atomized line-items." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990); C. Factotum, 337 NLRB 1, 1 (2001). Further, the Board must determine whether the allegations [in a particular case], as "an inclusive whole," were substantially justified at each phase of the litigation. *Glesby Wholesale*, 340 NLRB 1059, 1060 (2003).

Raley's and Independent Drug Clerks Assn., 357 NLRB No. 81, p. 2 (2011).

In this case, General Counsel's conduct from start to finish had no merit, and caused unnecessary and costly multiplication of proceedings. The case should have presented a straightforward question of whether Charging Parties' dues revocations were timely under UFCW Local 99's dues checkoff clause and binding Board law. The Union tried to litigate this question efficiently. But the General Counsel insisted on litigating legal theories that were either incomprehensible, had been repeatedly rejected, or were clearly contrary to established Board precedent.

First, the government's overall position was not substantially justified because its arguments were shifting, inconsistent, and contradictory. In the words of Judge Kocol, "Faced with ... clear [adverse Board] precedent, the arguments of the General Counsel have morphed and, as shown below, have become increasingly untethered from the complaint and contradictory in nature." *Fry's Food Stores and UFCW Local 99*, 358 NLRB No. 66 (2012) (affirming ALJ Order) (hereinafter "Board /ALJ Order") at 2. Judge Kocol underscored the Union counsel's "standing objection to the entire conduct of this case," that, "[o]ne week the [government's] theory is X. The next week the theory is Y. The following week the theory is X, Y, and Z." *Id.* (quoting Union counsel). Judge Kocol wrote "I completely agree with this statement." *Id.*

One glaring example of how GC's case was unterhered from the complaint is GC's attempt to challenge the facial validity of the checkoff authorization forms in his closing brief. This last-minute argument that the checkoff authorization forms were invalid contradicted the government's prior case. The complaint set forth the language of

the authorization, but it did not allege the union's authorization forms violated the Act. Board/ALJ Order at 5. In his brief to the Board in support of his special appeal, GC again declined to challenge the validity of the authorization forms by making arguments about the Union's conduct with regard to the forms, thus indicating that the language of the authorization forms was lawful. *Id.* at 6. Judge Kocol's decision points to at least three times when the GC expressly denied challenging the facial validity of the authorization forms, relying instead on the argument that the contract extension agreements created confusion as to when employees could revoke authorizations. *Id.* And yet after repeated denials that he was not challenging the language of the authorization forms, the GC took a position in his post-hearing brief that the authorization forms were facially invalid. *Id.* Judge Kocol correctly ruled that this conduct violates the Union's due process rights. *Id.*

Second, the government's overall position was not substantially justified because it engaged in litigation tactics which drew out the length of trial, multiplied proceedings, and drove up the costs of litigation with no legitimate purpose. For example, in Judge Kocol's own words:

At the original hearing in this case, I also considered a petition to revoke subpoenas that were served by the General Counsel on the Union and Fry's. I ruled that the Union and Fry's were not required to produce documents concerning "a class of similarly situated but as-yet-unidentified employees." I concluded that the identification of similarly situated employees could occur at the compliance stage of this proceeding if the complaint ultimately proved meritorious. The General Counsel also appealed this ruling and the Board again reversed my ruling. Armed with the additional evidence, the General Counsel offered several thousand additional documents into the record. In my view the documents predictably contributed nothing to the outcome of this case. Rather, the result was unnecessary costs to the Union and Fry's in collecting and copying the documents and avoidable delay in the final resolution of this case. Board/ALJ Order at 2 (emphasis added).

Note 3 further explains the strain resulting from the General Counsel's tactics:

The General Counsel requested, and I granted, 3 weeks for the General Counsel to assemble the documents in a manner consistent with the Rules of Evidence. I granted another week for the parties examine the thousands of documents to assure that the General Counsel had done so, and then yet another week for me to resolve any disputes over the documents. Thereafter, time was spent resolving issues raised receiving these documents into evidence. Board/ALJ Order at 2, N.3 (emphasis added).

This is just one example among many of how GC drove up costs in vain while pursuing legal theories with no merit.

GC's overall position, from inception to the Board proceedings, was characterized by inconsistent, contradictory arguments and resource-intensive tactics. GC can hardly argue that such a position was substantially justified. A fee award is particularly apt to reimburse the union in this case because GC's shifting legal theories extended the litigation and made it impossible for Union counsel to defend the case efficiently.

B. The government's first theory about membership revocation was not a "reasonable" novel extension of the law because it was either incomprehensible or barred by clear Board precedent.

While agencies may bring cases to define the outer limits of the law without exposing themselves to EAJA liability, this is not a case where the government advanced a reasonable theory to extend the law. Congress has noted that fee awards would be inappropriate when the government is "advancing in good faith a novel but credible extension and interpretation of the law." H.R. Rep. No. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4953, 4984; *Enerhaul, INc. v. NLRB*, 710 F.2d 748 (11th Cir.1983). Whether this standard is met is an issue to be decided on a case-by-case basis in light of all of the surrounding circumstances. *Blankenship & Assocs.*, 297 NLRB 799 (1990). *Compare Iowa Parcel Serv., Inc.*, 266 NRLB 392 (1983) (finding GC argued a novel but credible extension and interpretation of the law regarding alter ego relationships) *with Debolt Transfer, Inc.*, 271 NLRB 299 (1984) (finding GC's theory not a "reasonable" novel extension of the law).

GC's theory here was not a reasonable extension of the law because it was either barred by clear Board precedent or "incomprehensible" to the Judge (Transcript from Trial January 18, 2011 ("Tr.") at 44.) GC's theory alleged that after Charging Parties resigned from membership in the Union, the Union violated Section 8(b)(1)(A) by continuing to accept money deducted from the wages of Charging Parties pursuant to checkoff authorizations these employees had signed. The notion was that membership resignations are functional equivalents of timely revocations of dues checkoff authorizations, allowing employees to achieve through resignation what they could not achieve through revocation, even though the dues authorization forms repeatedly made clear that membership and dues were two separate issues.

The Judge concluded at the outset that GC's theory was soundly rejected by the Board in two cases - *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), and *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367 (1991) – both directly on point, making GC's legal position untenable. *National Oil Well* dictates that where language in a checkoff authorization form clearly indicates the authorized payments are *not* linked to union membership, as here, the union members who sign the form are obligated to pay dues regardless of whether they revoke their membership. *Lockheed* expressly permits such an agreement between employees and the union. Accordingly, Judge Kocol granted the Union's motion to dismiss portions of the complaint relying on this theory.

GC won a second opportunity to articulate a reasonable legal theory through a special appeal to Judge Kocol's ruling. The Board reversed the dismissal indicating that GC should have the opportunity to develop a novel theory, and remanded. Thus GC had further opportunity in its briefing to explain what exactly its novel theory was, but it was not able to do so. At trial, Judge Kocol told counsel for the GC:

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I've looked at it all again over the weekend, read your appeal again, looked at the cases again, all that, is non-meritorious and the Board's remand ... does not identify what your main theory is that I should refer to and consider. It simply says you argue there's a new theory and I've read your appeals again. I went through step by step in my analysis trying to figure out what is novel here that's not covered by existing law and it, frankly, came out to be the same result. (Tr. 28.) ... Frankly, your legal theory is incomprehensible." (Tr. 44).

No evidence submitted at trial clarified the matter. In his decision, Judge Kocol wrote, "In my view, no such viable legal theory has been ever articulated by the General Counsel in this case. ... I look forward to the Board's explanation of why the disposition of this issue is not squarely governed by the cases cited above." Board/ALJ Order at 2. The Board did not accept this invitation to clarify the purported novel legal theory, but merely affirmed Judge Kocol's conclusion that no viable theory existed. Board/ALJ Order at 1.

In sum, GC's theory that the Union should honor membership resignations as equivalent to timely revocations of dues checkoff authorizations is precluded by Board precedent and GC never articulated a comprehensible alternative theory that is tenable under governing law. GC cannot prove that a position which is contrary to settled caselaw and/or incomprehensible is "substantially justified."

C. The government's second theory that checkoff authorizations were revocable during the contract hiatus was not substantially justified because it had no legal merit.

GC's second theory - that the Union should accept revocation of dues checkoff authorizations during time periods not specified as open in the authorizations – was also not substantially justified because it is untenable as a matter of law. Again, the Board had already rejected this notion in a prior case *Frito Lay*, 243 NLRB 137, 144 (1979), holding that, in *precisely the same situation as the present matter*, employees are not free

to revoke their checkoff authorizations at will during the hiatus period between contracts. Board/ALJ Order at 5.

The other arguments which GC raised to avoid this clear precedent were irrelevant to the issue or meritless. GC argued that the Union sent confusing letters to the employees who attempted to revoke their checkoff authorizations, lacking information about when they could properly revoke. This is irrelevant because the letters were sent *after* the revocations at issue. Board/ALJ Order at 5. Next GC argued that because there were so many contract extensions, it was impossible for employees to figure out when they could revoke their checkoff authorizations. Again, this has no legal merit because clear Board precedent dictates that the contract extensions did not create new window periods for employees to revoke, as the contract that matters is the original contract. Board/ALJ Order at 5, citing *Atlanta Printing Specialties*, 215 NLRB 237 (1974), *enf'd* 523 F2d 783 (6th Cir. 1975).

Finally, GC belatedly attempted to rely on the illogical argument that the language in the authorization forms was ambiguous. Board/ALJ Order at 5. This argument is equally without merit. It is obvious the Union's dues authorization complies with the plain language of the relevant statute (29 U.S.C § 302(c)(4)), Department of Justice guidance, and Board law on the subject. In any event, GC is not empowered to police the interpretation of allegedly-ambiguous checkoff language where the union's interpretation is plausible. *American Smelting & Refining, Co.*, 200 NLRB 1004 (1972).

All of GC's arguments were at every stage of the proceeding, either incomprehensible, barred by clear Board precedent, or irrelevant. Because they lacked legal merit, they cannot be called "substantially justified" at any stage, much less at every stage. Moreover, the government's overall conduct was unjustified because the government persisted, contrary to the ALJ's advice, in pursuing litigation tactics that drove up litigation burdens without advancing their case. This is a textbook case of government conduct which EAJA was meant to deter, and for which the Union should be made whole.

III. All of the Hours Worked Should be Awarded at the EAJA Inflation-Adjusted Rates, Which Are Less Than What the Union Paid and Less Than Prevailing Market Rates.

With regard to the rates at which attorney fees are to be awarded, the EAJA provides:

- (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that
 - (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved; and
 - (ii) attorney or agent fees shall not be awarded in excess of \$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

5 U.S.C. § 504(b)(1).

A. Prevailing market rates are well above the rates paid by the Union.

Two attorneys, Steven Stemerman and Adam Zapala, were Local 99's principal representatives throughout this matter. Steven Stemerman, a senior partner with over thirty years of experience, billed UFCW at the rate of just \$205 per hour for 2010 and 2011. Adam Zapala, a senior associate who began practicing in 2006, billed at only \$185 per hour for 2010 and 2011, and at \$210 in 2012. This rate was discounted from prevailing market rates by counsel in order to provide accessible legal services to a union whose resources come directly from dues voluntarily paid by members who in this Right-to-Work state cannot be compelled to pay more. Moreover, this union has been facing constant challenges necessitating legal expense such as several recent legislative

enactments designed to financially cripple unions, such as the one enjoined recently in *United Food & Commercial Workers v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011).

EAJA starts by looking at prevailing market rates, but those are well above the EAJA cap of \$125 plus inflation (\$170-80 in this case). The prevailing rate for counsel with similar experience in Arizona can be seen first from a recent fee declaration submitted by a group active in labor law issues in opposition to unions, the Goldwater Institute, to the U.S. District Court in Phoenix, (Ex. A to Stemerman Decl.) Based on its review of the local market, the Institute there sought and obtained hourly rates of \$450 for counsel with more than 20 years' experience, \$350/hr for 10+ years, \$265 for 3+ years, and \$100 for law clerks. *Id.* at p. 14. A labor and employment litigator who has been on the other side of the undersigned's office in several labor and employment matters in Arizona, Stephanie Quincy, disclosed in a 2010 fee declaration that her standard rate was \$405 per hour. (Ex. B to Stemerman Decl.) A union side labor and employment litigator in Arizona, Susan Martin, stated in a 2005 fee declaration for a case involving supermarket employees that \$350 per hour was the reasonable prevailing rate. Ex. C to Stemerman Decl. Other recent Arizona cases show fees consistently awarded at \$300 or more an hour.

The Union also reviewed the rates set forth by the Justice Department's Laffey Fee Matrix,² which is produced based on survey data for the purpose of awarding fees

¹ See Stemerman Decl. noting the following examples: in an Order filed June 25, 2008, Judge David G. Campbell approved a \$300 hourly rate in *Mohajerin v. Pinal County*, U.S. Dist. of Ariz. Case No. CV-07-1746-PHX-DCG; in a Minute Entry Order filed February 14, 2008, Judge Joseph Kreamer approved a \$300 hourly rate in *Tidwell v. Crown Truck Sales & Salvage, Inc. and Onyx Acceptance Corp.*, Maricopa County Superior Court Case No. CV 2005-090931; in an Opinion published on January 7, 2008, and arising from a case in the District of Arizona, the Ninth Circuit approved a \$300 blended attorney-fee hourly rate in *United Steel Workers of America v. Retirement Income Plan for Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 565 (9th Cir. 2008); in an Order filed February 23, 2006, Judge James A. Teilborg approved a \$300 hourly rate in *West v. G. Ware Travelstead*, U.S. Dist. Ariz. Case No. CV 04-2934-PCY. ² Named after the case that first used the matrix, *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354, (D.D.C. 1983) *aff'd in part, rev'd in part on other grounds*, 746F.2d 4 (D.C. Cir 1984). This matrix is posted by the Justice Department at www.justice.gov/usao/dc/ divisions/ Laffey Matrix 2003-2013.pdf.

against the government and regularly relied upon by courts around the country. *See*, *e.g.*, *Craigslist*, *Inc.* v. *Naturemarket*, *Inc.*, 694 F.Supp. 2d 1039, 1067 (N.D. Cal. 2010); *Dobina v. Carruthers*, USDC N.D. Ohio Case No. 5:09cv2426 (May 3, 2010).³ The Laffey Matrix when adjusted for cost-of-living in Phoenix shows the reasonable rate for attorneys in Phoenix with twenty years of experience or more (such as Mr. Stemerman) from 2010-11 was \$446 per hour, and for an attorney with four to seven years of experience (such as Mr. Zapala) was \$258 per hour.

By any measure, the prevailing market fees are far above what UFCW Local 99 paid its attorneys, who were providing these legal services at discounted hourly rates of \$185-\$205 in 2010-11. Here the Union merely seeks an award at the lower rates of \$175.06/hour for 2010, and \$180.59 for 2011 and 2012. These are the rates resulting from adjusting the statutory cap under EAJA for the increase in cost of living since EAJA was adopted in 1996, as reported on the Ninth Circuit Court website, www.ca9.uscourts.gov/content/view.php?pk_id=0000000039. Inflation adjustment is near-universal among courts applying EAJA. See, e.g., *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005); *Johnson v. Sullivan*, 919 F. 2d 503 (8th Cir. 1990)(reversing lower court for not awarding inflation adjustment); *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir.1988); *Trichilo v. Secretary of Health & Human Servs.*, 823 F.2d 702, 705-06 (2d Cir.1987); *Allen v. Bowen*, 821 F.2d 963, 967 (3d Cir.1987); *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 523 (1st Cir.1987); *Hirschey v. F.E.R.C.*, 777 F.2d 1, 5 (D.C.Cir.1985). Thus the Union's requested rates are reasonable.

³ Available both on PACER and through Googlescholar.

⁴ The Union recognizes that the Board has not yet adopted a rule recognizing inflation in rates under EAJA (indeed its regulation 102.145 is so outdated that it reflects the prior version of the EAJA under which fees were capped at \$75 instead of \$125). The EAJA authorizes the Board to increase the maximum attorney fee rate where justified but neither EAJA, nor the Board's Rules and Regulations requires the agency to announce such a regulation in legislative-type rulemaking procedures. To honor the intent of Congress to protect EAJA's attorney fee rates from inflationary pressures, the Federal Mine Safety and Healthy Review Commission ALJ increased the maximum attorney fee rates under EAJA through an adjudicatory proceeding and applied it to a pending case. *Contractor's Sand and Gravel, Inc. v. Secretary of Labor, Mine Safety and*

B. The General Counsel's excessive delay justifies the requested rates.

The rates requested are further justified by the fact that the GC caused excessive delay resulting in higher costs in litigating this case. The EAJA expressly provides that "special factors", in addition to inflation, justify higher rates. 5 U.S.C. § 504b)(1)(ii). One "special factor" repeatedly recognized by the courts which also should be recognized by the Board is delay either excessive in duration or caused by bad faith. *Oklahoma Aerotronics, Inc. v. US*, 943 F. 2d 134, 1350-51 (CADC 1991)(following *Wilkett v. ICC*, 844 F.2d 867, 876 (D.C.Cir.), reh'g denied, 857 F.2d 793 (1988), and *Hirschey v. FERC*, 777 F.2d 1, 5 (D.C.Cir.1985); *Pollgreen v. Morris*, 911 F. 2d 527, 538 (CA 11 1990)("If the government's litigation delay was the result of bad faith or the length of the delay was excessive, regardless of the merits of the position litigated, then such delay could constitute a special factor."); *Perales v. Casillas*, 950 F. 2d 1066, 1077 (CA 5 1992)("We agree that some forms of delay may justify enhancing the statutory base rate under the EAJA.").

The GC caused excessive delay by taking a special appeal of the Judge's dismissal after the first trial and order to quash certain documents. Board/ALJ Order at 2. The appeal was in bad faith because while GC repeatedly claimed it deserved an opportunity to test a novel theory, it never once articulated this theory, despite repeated opportunities and delays. The case could have been tried in June of 2010 and resolved then. Instead, GC went up before the Board, proceeded to a second trial, never articulated its supposed "new theory" and still lost its entire case.

The GC caused further excessive delay in resolving basic evidentiary issues.

Rather than seek to admit evidence through the established Rules of Evidence, GC attempted to place into evidence a drive consisting of thousands of pages of documents.

Health Administration, 18 FMSHRC 1820, 1996 WL 697606, aff'd, sub nom. Contractor's Sand and Gravel, Inc. v. FMSHRC, 199 F.3d 1335 (D.C. Cir. 2000). The Board here should do the same. However, without waiving this position but merely out of caution, Local 99 will forthwith file a formal rulemaking petition with the Board to allow rates higher than \$125. This petition will hopefully be addressed by the time judicial review of the underlying decision is complete.

The Union objected and the Judge agreed, only allowing certain kinds of relevant documents to come in. Post-trial, the Union had to spend long hours going through the voluminous documents, raising objections to particular categories of documents, and communicating with GC about such objections. The evidentiary dispute required an additional hearing with the Judge, who sustained many of the Union's objections. This caused a delay of more than a month. Board/ALJ Order at 2. The billing records attached in Exhibit 3 demonstrate the excessive time required and the fees necessarily incurred as a result of this tactic (see Exhibit 3, billing entries dated January 20, 2011 through March 9, 2011). Also noted *supra*, Judge Kocol found these documents contributed "nothing to the outcome of this case" except for "unnecessary costs." *Id*.

C. The amount of time expended was reasonable and necessary in light of the effort required.

The attorneys for UFCW Local 99 expended 537.10 hours in this case. A detailed explanation for each time entry and expenses incurred is attached in Ex. 3. The defense included a thorough investigation of the case and its factual basis, meetings with the Union, a review of the relevant case law, preparation of the motion to dismiss portions of the complaint, preparation of opposition brief to the special appeal, preparation for trial, including a petition to revoke an unwarranted subpoena, document review of thousands of documents unnecessarily introduced into evidence by GC, issuing objections to documents, the development of exhibits and preparation of witnesses, two long days of hearing before ALJ Kocol, preparation of post-hearing brief, and preparation of opposition papers to the exceptions. All of the time expended was reasonable and necessary, especially given that the broad relief sought by GC would have had a disastrous impact on the Union's finances, and thus the Union was forced to devote heavy resources to defend.

As has been discussed above, GC frequently shifted its legal theories, and thus the Union was forced to continually reevaluate its defense. Furthermore, the case involved resource-intensive document review of thousands of documents unreasonably introduced

by GC against the advice of the judge. It also involved numerous motions to oppose GC's unreasonable subpoenas. The hours required were entirely the result of GC's resource-intensive approach. GC insisted on multiple opportunities for incomprehensible legal theories to be heard, against the Union's objections and ALJ's advice. GC insisted on introducing thousands of documents in order to address compliance issues before liability was determined. This conduct unnecessarily added thousands of dollars to the Union's overall defense expenditures here. Because the amount of work in this case has been very large, and the Union has dutifully paid its fees, its resources have been substantially drained. This is money that the Union no longer has to service its members and organize to strengthen their economic position.

D. UFCW Local 99 Should Be Awarded its Attorney Fees Incurred in Preparing and Litigating the Present EAJA Application

EAJA provides for an award of attorney fees and expenses incurred in litigating the fee request itself. *Commisioner, INS v. Jean*, 496 U.S. 154, 163-165 (1990). Of the total time requested in this case, just 42.6 hours are for this fee application.

CONCLUSION

The Board should award attorneys fees and expenses to UFCW Local 99.

Dated: August 8, 2012 Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years and not a party to the within matter. My business address is 595 Market Street, Suite 1400, San Francisco, CA 94105. I hereby certify that a true and correct copy of the foregoing: **NLRB Case Nos.**: 28-CA-022836; 28-CA-022837; 28-CA-022838; 28-CA-022840; 28-CA-022858; 28-CA-022871; 28-CA-022872; 28-CB-7045; 28-CB-7047; 28-CB-7048; 28-CB-7049; 28-CB-7058; 28-CB-7062; 28-CB-7063

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was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned was thereafter served upon the following parties via electronic mail and First Class Mail on August 8, 2012:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 8, 2012, at San Francisco, California.

/s/ Elizabeth Jackson

Elizabeth Jackson